Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ASHER RUBINSTEIN,

Cross-Petitioner,

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, PAUL MICHAEL LYNCH, AND WILLIAM C. VAN BUSKIRK,

Cross-Respondents.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED

In this employment discrimination case, summary judgment was granted against the plaintiff his national origin and religious discrimination claims, but he was allowed a jury trial on one of his retaliation claims. The jury found in his favor, awarding $2500 in compensatory damages and $75,000 in punitive damages. The District Court also awarded as prospective relief a 3.5% pay raise, which equals approximately $40,000 over ten years. The United States Court of Appeals for the Fifth Circuit affirmed the summary judgment, but reduced the punitive damage verdict, holding that the thirty to one ratio of punitive to compensatory damages was unreasonable. The Fifth Circuit refused to consider the value of the prospective relief in calculating the damages against which the punitive award is to be measured.

1. After this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000), should a plaintiff who has concededly demonstrated a prima facie employment discrimination case, who has concededly presented sufficient evidence for a jury to find pretext, and who has concededly presented sufficient evidence for a jury to find that one decisionmaker was motivated by bias, that other decisionmakers made discriminatory remarks about his national origin and religion, and that his employers altered his evaluations in an effort to inhibit his advancement, be allowed to present his discrimination claims to a jury?

2. Does the "stray remarks" doctrine of the United States Court of Appeals for the Fifth Circuit survive this Court's decision in *Reeves*?

3. In evaluating the reasonableness of a jury's punitive damage verdict, should the value of prospective relief be considered when calculating the damages against which the punitive award is to be measured?

4. Even if prospective relief must be excluded, is a thirty to one ratio of punitive to compensatory damages so unreasonable as to be unlawful?

5. What is the standard of review of a trial court's ruling on a challenge to the reasonableness of a punitive damage award?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

ASHER RUBINSTEIN,
Cross-Petitioner,

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, PAUL MICHAEL LYNCH, AND WILLIAM C. VAN BUSKIRK,
Cross-Respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 12.5 of the rules of this Court, Cross-Petitioner Asher Rubinstein requests that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit. He is the Respondent to the Petition for Writ of Certiorari filed by the cross-respondents here. *Administrators of the Tulane Educational Fund v. Rubinstein*, No. 00-789.

OPINIONS BELOW

The July 6, 2000 opinion of the Court of Appeals in the present matter is reported at 218 F.3d 392 (5th Cir. 2000), and is reproduced in Appendix A to Tulane's petition. No. 00-789,

p. 1a (hereafter "pet. app."). The March 20, 1998 of the United States District Court for the Eastern District of Louisiana granting partial summary judgment against the plaintiff, Mr. Rubinstein, is unreported and is reproduced in Appendix E to Tulane's petition. Pet. App. 43a. The March 6, 1998 opinion of the District Court granting partial summary judgment against Rubinstein on other claims is reported at 58 F.Supp.2d 702 (E.D. La. 1998), and is reproduced in Appendix F to Tulane's petition. Pet. App. 48a.

JURISDICTION

The opinion of the Court of Appeals was issued on July 6, 2000. A timely petition for rehearing was denied on August 14, 2000. Tulane's petition was filed on November 13, 2000, and docketed on November 16, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. § 2002e-2(m) and § 2000e-3(a), which are reproduced in Appendix I of Tulane's petition. Pet. App. 106a-107a.

STATEMENT OF THE CASE

The Cross-Petitioner, Asher Rubinstein, is a Jewish man, raised in the former Soviet Union, and a tenured member of the faculty of mechanical engineering at Tulane University. He was hired as an Associate Professor in 1987 and achieved tenure in 1990. His tenure recommendation pointed out that he was "an outstanding researcher" and a "satisfactory teacher." Pet. App. 2a-3a. However, after being denied raises or awarded much lower raises than his colleagues between 1993 and 1997, and being denied promotion to Full Professor on multiple occasions during those years, he filed suit in the United States District Court for the Eastern District of Louisiana alleging

unlawful discrimination and retaliation.

All of his claims were denied by way of summary judgment except a retaliation claim related to the refusal of a raise in 1997. A jury heard that claim and found in Mr. Rubinstein's favor, awarding $2500 in compensatory damages and $75,000 in punitive damages. The District Court also ordered that Mr. Rubinstein receive a 3.5% raise as a prospective remedy for the unlawful retaliation. The United States Court of Appeals for the Fifth Circuit affirmed the grants of summary judgment against Rubinstein and affirmed the verdict in his favor on the retaliation claim, but remitted the punitive damage verdict. In so doing, the Court of Appeals refused to consider the 3.5% pay raise as part of the damages against which the punitive award was to be measured. That left only the $2500 in compensatory damages against which to compare the $75,000 punitive award. The Court held that the resulting thirty-to-one ratio was too high and reduced the jury's punitive damage verdict by two-thirds to $25,000. *Id.* 27a-33a.

As the record demonstrates, Rubinstein's problems at Tulane began after 1991, when William Van Buskirk was promoted to Dean of the School of Engineering, and 1992, when Paul Michael Lynch was named Chair of the Department of Mechanical Engineering. In 1993, Rubinstein was denied a raise. When he asked Van Buskirk about this, the Dean said that Lynch might have refused to give Rubinstein the raise because Rubinstein is Jewish and Russian. Rubinstein was given the lowest raise in the department in 1994, after which he again went to Van Buskirk, who said: "what are you going to do, sue me? Do you know what happens to people who sue their employer?" Rubinstein filed a complaint with the EEOC in December of 1994. He was denied promotion to the rank of Full Professor in early 1995. He filed a second complaint with the EEOC in April of 1995. Soon thereafter, he received the lowest raise in the department. He filed this lawsuit on October 11, 1995. *Id.* 3a-4a.

In both 1996 and 1997, Rubinstein again was denied promotion to Full Professor, and was denied a raise in 1997. (He also was denied a raise in 1996 due to a salary freeze for tenured faculty and does not complain of that incident). *Id.* 4a-5a. Rubinstein amended his complaint to include these subsequent actions. Van Buskirk later admitted that the 1997 raise was denied because Rubinstein, by filing suit, had demonstrated he was not a "good colleague." *Id.* 16a-17a.

As previously stated, the record includes documentation showing Rubinstein to be an "outstanding researcher" and "satisfactory teacher," evidence that Van Buskirk believed Lynch to be motivated by unlawful discrimination, threats by Van Buskirk to Rubinstein about what would happen if he sued, and an admission by Van Buskirk that the 1997 raise was denied in retaliation for Rubinstein's lawsuit. In addition, as the Fifth Circuit held, Rubinstein produced evidence sufficient to show that the defendants' stated reason for denying the raises and promotions was pretextual; that his superiors had tampered with and altered teaching evaluations in order to stack the deck against him; and that two members of the Committee that plays a role in the relevant decisions made discriminatory remarks toward Rubinstein. One, Professor Watts, called Rubinstein a "Russian Yankee" and a "commie," and made anti-semitic comments. Another, Professor Bruce, told another professor that if "the Russian Jew" could obtain tenure, anyone could. *Id.* 3a, 11a-13a, 16a-17a. Nevertheless, the Fifth Circuit affirmed the grant of summary judgment against Rubinstein on the discrimination claims, and with respect to the one retaliation claim that did go to trial, reduced the punitive damages award by two-thirds, from $75,000 to $25,000. Pet App. 33a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS CONTINUES, EVEN AFTER *REEVES v. SANDERSON PLUMBING PRODUCTS, INC.*, TO ARROGATE UNTO ITSELF THE ROLE OF THE JURY IN EMPLOYMENT DISCRIMINATION CASES.

As the Fifth Circuit acknowledged, there was enough evidence for a jury to conclude the existence of a prima facie case, of pretext, of the alteration of student evaluations, of discriminatory and anti-semitic remarks by decisionmakers, and of a statement by the Dean that unlawful discrimination may have motivated actions of the department chair. Pet. App. 3a, 11a-13a. But even though the jury could have concluded that all of these things occurred, the Fifth Circuit upheld the District Court's decision granting summary judgment on the discrimination claims.

In so doing, the Fifth Circuit said:

> While we are mindful of the Supreme Court's recent admonition that Title VII plaintiffs need not always present evidence above and beyond their prima facie case and pretext, *see Reeves v. Sanderson Plumbing Products, Inc.*, 2000 WL 743663, *5, discrimination suits still require evidence of discrimination. . . . Rubinstein has failed to meet his burden of producing any evidence of discrimination sufficient to survive summary judgment, and his evidence to rebut the non-discriminatory reasons offered by Tulane is not so persuasive as to support an inference that the real reason was discrimination.

Pet. App. 12a. The Court also held that because there was no proof that the discriminatory remarks of decisionmakers were

proximate in time or made in relation to the negative employment decisions, the comments "are best viewed under our Circuit precedent as stray remarks, thus not warranting survival of summary judgment." *Id.* 13a, *citing, Krystek v. University of Southern Mississippi*, 164 F.3d 251, 256 (5th Cir. 1999).

This Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000), held that the Fifth Circuit had, in that case, "impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Id.* at 2111. Because the plaintiff there had "established a prima facie case of discrimination, introduced enough evidence for the jury to reject [the defendant's] explanation, and produced additional evidence of age-based animus," this Court held "there was sufficient evidence for the jury to find that [the defendant] had intentionally discriminated." *Id.* at 2112. Similarly, in the present case, the plaintiff established a prima facie case, introduced enough evidence for the jury to reject the defendant's explanation, and produced additional evidence of discriminatory animus. Yet the Fifth Circuit once again, as in *Reeves*, substituted its judgment for that of the jury.

This is not the only recent case in which the Fifth Circuit has failed to follow the lesson of *Reeves*. In *Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir. 2000), *pet. for cert. filed*, No. 00-806 (Nov. 17, 2000), the Court of Appeals reversed a jury verdict finding national origin discrimination. It did so despite its own conclusion that a prima facie case had been established and that sufficient evidence existed to support the jury's finding that the defendants' explanation was pretextual. While acknowledging this Court's decision in *Reeves*, the Fifth Circuit in *Vadie* nevertheless held that reversal of the jury verdict was required because of the plaintiff's failure to produce evidence beyond the prima facie and pretext showings that had been made. *Id.* at 373-374.

The same mistake was made in *Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296 (5th Cir. 2000), *pet. for cert. filed*, No. 00-820 (Nov. 20, 2000), a decision issued about two weeks prior to this Court's opinion in *Reeves*. There, the Fifth Circuit reversed a jury verdict finding age discrimination, holding that while the plaintiffs' evidence "might have been sufficient to cast doubt on [the defendant's] proffered explanations for plaintiff's discharges, . . . it did nothing to raise an inference that the real reasons for the discharges were related to age." *Id.* at 306.

This Court's decision in *Reeves* makes it clear that federal courts generally should not grant judgment against a plaintiff as a matter of law where evidence has been produced sufficient to prove a prima facie case and to prove that the defendant's proffered explanation is pretextual. 120 S.Ct. at 2109. Of course, *Reeves* did say that "there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.* But the illustrative examples mentioned by this Court in *Reeves* demonstrate that such situations are rare: "For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* Neither in the present case nor in *Vadie* or *Wyvill* was there some "other, nondiscriminatory reason" for the challenged decisions that was "conclusively revealed" by the trial record, and none of these cases contain "uncontroverted independent evidence that no discrimination had occurred."

Unfortunately, the Fifth Circuit continues, even after *Reeves*, to arrogate unto itself the role of jury. Because its decision in the present case is part of a pattern of decisions that

contravene the principles expressed in *Reeves*, certiorari should be granted here.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE IF THE FIFTH CIRCUIT'S "STRAY REMARKS DOCTRINE" SURVIVES THIS COURT'S DECISION IN *REEVES*.

As previously noted, the Fifth Circuit in this case discounted key evidence of discrimination because, it said, there was no proof that discriminatory remarks by members of the relevant committee were proximate in time or made in relation to the negative employment decisions. Thus, said the Court, these comments "are best viewed under our Circuit precedent as stray remarks, thus not warranting survival of summary judgment." *Id.* 13a, *citing, Krystek v. University of Southern Mississippi*, 164 F.3d 251, 256 (5th Cir. 1999). The Fifth Circuit has applied this doctrine in other recent cases. *See, Wyvill v. United Companies Life Ins. Co.*, 212 F.3d at 304.

However, in *Reeves*, this Court criticized the Fifth Circuit's practice in this regard. According to this Court, the Fifth Circuit, in refusing to consider age-related comments by those involved in employment decisions "on the ground that they 'were not made in the direct context of [plaintiff's] termination,'" had "failed to draw all reasonable inferences in favor of [the plaintiff]." *Reeves*, 120 S.Ct. at 2111.

In the present case, the Court of Appeals, as it has done so often in employment cases, utilized its "stray remarks" doctrine to discount evidence of discriminatory remarks by decision-makers. This led the Court to uphold the grant of summary judgment here and deny the plaintiff a jury trial on the issue of national origin discrimination. Certiorari should be granted to determine if this doctrine survives this Court's decision in *Reeves*.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT ISSUES REGARDING JUDICIAL REVIEW OF PUNITIVE DAMAGE VERDICTS BY JURIES THAT ARE RAISED BY THIS CASE.

Although the Court of Appeals reviewed the punitive damages award for federal statutory excessiveness rather than constitutional excessiveness, the Court stated that the three-factor analysis it utilized is based on, and is no different than, the constitutional test prescribed by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Pet. App. 28a-31a. Moreover, while the Court of Appeals described this as a "non-constitutional challenge to punitive damages," *id.* at 31a, it concluded its opinion by stating that the reduced award after the remittitur "does not test the boundaries of the Due Process clause." *Id.* at 32a. Thus, at least some of the issues raised by this decision apply both to consititutional and non-constitutional analyses of punitive damage awards.

With respect to the first of the three factors -- degree of reprehensibility, *BMW*, 517 U.S. at 575 -- the Court of Appeals held that Tulane's action "demonstrate[s] a high degree of reprehensibility under the First *BMW* factor." Pet. App. 30a. But despite that degree of reprehensibility, the Court of Appeals' approach to the second factor -- the "ratio" of the punitive damages "to the actual harm inflicted on the plaintiff," *BMW*, 517 U.S. at 580 -- led to the reduction of the punitive damages award from $75,000 to $25,000. Specifically, the Court of Appeals refused to consider the prospective 3.5% pay raise as part of the damages against which the ratio of the punitive award is to be calculated. It did so, it said, because "[t]he pay-raise is prospective relief to correct a wrong previously committed, while the punitive damages award is properly the tool used to correct the retrospective harm." Accordingly, said the Court, the ratio could only take into account "the compensatory damages awarded for the prior harm." Pet. App. 31a.

Once it excluded the pay raise, the Court of Appeals ruled that the thirty-to-one ratio of the $75,000 punitive verdict to the $2500 compensatory damage award was "so disproportionate as to 'raise a suspicious judicial eyebrow,' and require a remittitur." Pet. App. 31a, *quoting, TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting). In light of its ruling on this second *BMW* factor, the Court said it "need not examine the third prong of the *BMW* test." Pet. App. 31a. The Court remitted the award from $75,000 to $25,000 so that it would fit within the ten-to-one ratio authorized in *TXO*. Pet. App. 32a.

The Court of Appeals' decision raises several important issues of federal law that should be resolved by this Court relating to judicial review of punitive damage verdicts issued by juries.[1]

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[1] After remand by the Fifth Circuit, the District Court ordered plaintiff Rubinstein to declare, within thirty days, whether he would accept the remittitur or insist on a new trial. Rubinstein informed the Court that, if ultimately faced with the choice, he would forego the new trial, but he also made it clear that, for present purposes, he "reserv[es] [his] rights to seek writs to the United States Supreme Court on the remittitur issue and all other issues in the case." *See* the appendix to this cross-petition. Although there is some suggestion in the case law that acceptance of a remittitur forecloses a right to appeal, *see, Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977), the question should not be foreclosed on this conditional cross-petition for certiorari. First, Rubinstein's response to the District Court order simply was an articulation of the decision he intends to make if still faced with the choice after any review by this Court. Second, this is not a district court remittitur being appealed to a court of appeals, but a court of appeals remittitur in which certiorari is being sought in this Court. Third, Rubinstein is raising the issue on this cross-petition only after the certiorari process has been invoked by Tulane. Thus, this case is quite different from the situation in *Donovan*, where the plaintiff accepted a district court remittitur and thus was foreclosed from appealing it to the Court of Appeals.

A. By Adopting a Rule That Prospective Relief Must be Excluded from the Calculation of Damages Against Which the Ratio of a Punitive Award is to Be Measured, the Court of Appeals Decision Conflicts With This Court's Rulings in BMW v. Gore and TXO Production Corp. v. Alliance Resources Corp.

In *BMW*, this Court said "[t]he second . . . indicium of an unreasonable or excessive punitive damages award is its ratio to the *actual harm* inflicted on the plaintiff." 517 U.S. at 580. (emphasis added). It traced language from *TXO* and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and said:

> [T]he proper inquiry is "'whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred.'" *TXO*, 509 U.S. at 460 (emphasis in original), quoting *Haslip*, 499 U.S. at 21. Thus, in upholding the $10 million award in *TXO*, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded. That difference suggested that the relevant ratio was not more than 10 to 1.

BMW, 517 U.S. at 581.

Obviously, the money a plaintiff will lose in the future because a pay raise has been illegally denied is part of the "actual harm inflicted" on him, and is part of the "harm to the victim that would have ensued if the [illegal] plan had succeeded." The Fifth Circuit's distinction between, on the one hand, "prospective relief" and, on the other, "compensatory damages for prior harm" simply makes no sense where the proper measure is the "harm . . . that would have ensued if the [illegal] plan had succeeded."

Indeed, in *TXO*, this Court upheld a $10 million punitive damage verdict where the compensatory damages were only $19,000 because "the actual value of the 'potential harm'" to the plaintiffs was at least one million dollars and thus within an acceptable ratio. 509 U.S. at 446, 462. Just as the plaintiff in that case would have lost at least one million dollars if the defendants had succeeded in their wrongful conduct, so the plaintiff here would have lost the future value of his pay raise.

The prospective raise of 3.5% in this case will equal approximately $33,000-$40,000 over the next ten years. Record, Vol. 10, pp. 123-124. This is a ratio of approximately two to one, which clearly is not excessive. In light of the conflict between the Fifth Circuit ruling and this Court's decisions, certiorari should be granted to determine whether prospective relief should be included in analyzing the reasonableness of punitive damage jury verdicts.

B. Even if the Court of Appeals Acted Properly in Excluding Prospective Relief From the Analysis, Its Decision Raises the Unresolved Question of Whether a Thirty to One Ratio of Punitive to Compensatory Damages is So Unreasonable as to be Unlawful.

Although the Court of Appeals acknowledged that a ratio of ten to one is not excessive in light of *TXO*, it said that the ratio of thirty to one in this case "is so disproportionate as to . . . require a remittitur." Pet. App. 31a. While this Court held in *BMW* that a 500 to one ratio is excessive, it has not resolved this issue in any case falling between the *BMW* and *TXO* figures. *BMW* did say that "*[i]n most cases*, the ratio [represented by the jury's award] will be within a constitutionally acceptable range, and remittitur will not be justified on this basis." 517 U.S. at 583 (emphasis added). But it was purely on this basis -- the second *BMW* factor -- that the Court of Appeals struck down the jury's punitive damage verdict in the present case. Thus, certiorari should be granted.

C. *This Case Raises the Same Issue Upon Which This Court Granted Certiorari in Cooper Industries v. Leatherman Tool Group, Inc., No. 99-2035: What is the Standard of Review of a Trial Court's Ruling on a Challenge to the Constitutionality of a Punitive Damage Award?*

This Court has granted certiorari to determine the standard of review that federal appellate courts should apply when reviewing a trial court's ruling on the reasonableness of a punitive damages award. *Cooper Industries v. Leatherman Tool Group, Inc.*, No. 99-2035 (Cert. granted Oct. 10, 2000). The same issue exists here. The federal district judge who presided in this case held that the jury's award was reasonable and rejected Tulane's request for a remittitur. Pet. App. 34a-37a. The Fifth Circuit reversed without according any deference to the District Court's decision. Although the Fifth Circuit did not discuss the standard of review, its opinion proceeds as if the Court were examining the question de novo.

The major difference between *Cooper Industries* and the present case is that *Cooper Industries* involves the constitutionality of a punitive damages award, while the Fifth Circuit in the present case couched its decision as one based on a non-constitutional analysis of excessiveness. But if this Court concludes in *Cooper Industries* that the abuse of discretion standard is proper in a constitutional case, it also is proper in a non-constitutional case, thus requiring a remand for reconsideration in the present matter. Even if this Court holds otherwise in *Cooper Industries* and adopts a de novo standard in constitutional cases, certiorari should be granted here to determine the question in non-constitutional settings. Given the special role that appellate review plays in the protection of constitutional rights, it is conceivable that a de novo standard could apply in constitutional cases but an abuse of discretion standard in non-constitutional ones. This is particularly true in an employment retaliation case such as this one, where Congress has statutorily capped the amount of punitive

damages at $300,000, 42 U.S.C. § 1981a, thus reducing the danger of unconstitutionally excessive awards.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Fifth Circuit in this case.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ASHER RUBINSTEIN	**CIVIL ACTION**
VERSUS	**NO: 95-3343**
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL.	**SECTION: "S" (5)**

ORDER

(Filed Jul. 26, 2000)

Pursuant to the ruling of the United States Court of Appeals for the Fifth Circuit, Asher Rubinstein is hereby **ORDERED** to inform the court in writing within 30 days whether he accepts the remittitur of punitive damages from $75,000 to $25,000, so that the court may enter judgment accordingly, or whether he refuses the remittitur, so that the court may grant a new trial solely on the issue of punitive damages.

NEW ORLEANS, LOUISIANA, THIS 26th DAY OF July, 2000.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ASHER RUBINSTEIN	**CIVIL ACTION**
versus	**NO: 95-3343**
THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, MICHAEL LYNCH AND WILLIAM C. VAN BUSKIRK	**JUDGE: LEMMON**
	SEC. "S"-1

****

PLAINTIFF'S NOTICE REGARDING REMITTITUR FILED AS PER THE COURT'S ORDER

(Filed Aug. 28, 2000)

NOW INTO COURT, through undersigned counsel, comes plaintiff, Asher Rubinstein, who with respect notifies the Court that given the choice between a new trial solely on the issue of punitive damages or a remititur of the punitive damages award from $75,000.00 to $25,000.00, plaintiff, Asher Rubinstein choses [sic] remittitur under protest, with a reservation of rights to seek writs to the United States Supreme Court on the remittitur issue and all other issues in the case.

Respectfully submitted,

BY: /s/ William M. McGoey
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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing pleading has been served upon all parties, by depositing same in the United States mail, postage paid and properly addressed, this 28th day of August, 2000.

/s/ William M. McGoey